Hon. Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

RENTBERRY, INC., a Delaware Corporation, and Delaney Wysingle, an individual, Plaintiffs, vs. CITY OF SEATTLE, a Washington Municipal Corporation, Defendant.	No. 2:18-cv-00743-RAJ CITY OF SEATTLE'S REPLY IN SUPPORT OF SUMMARY JUDGMENT **NOTE ON MOTION CALENDAR:** October 19, 2018

A. This case is not justiciable.

Plaintiffs have not met their burden to demonstrate that this case is justiciable. *Sumanti v. Strange*, 2017 WL 6492679, at * 3 (W.D. Wash. Dec. 19, 2017) (Jones, J.). "Because plaintiffs seek declaratory and injunctive relief only, there is a further requirement that they show a very significant possibility of future harm; it is insufficient for them to demonstrate only a past injury." *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). With respect to Mr. Wysingle, there is no dispute that (1) he is not, nor has he ever been, a member of Rentberry; (2) did not have a house to list on Rentberry at the time this Complaint was filed; and (3) does not currently have a house to list on Rentberry. While plaintiffs quibble with the City's characterization of this undisputed evidence, the evidence speaks itself. The most Mr. Wysingle can muster is a "someday"

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intentions to utilize Rentberry to rent his home. Such speculative intentions fail as a matter of law. *See, e.g., Lopez v. Candaele*, 630 F.3d 775, 787-88 (9th Cir. 2010); *see also Sumanti*, 2017 WL 6492679 at * 3 (injury must be "real and immediate, not conjectural or hypothetical") (quotations omitted).

Even assuming Mr. Wysingle had standing at the time he filed his Complaint, his claims are now moot. Plaintiffs' reliance on the "capable of repetition but evading review" doctrine is misplaced. The exception is applied "sparingly, and only in exceptional situations." *Protectmarriage.com—Yes on 8 v. Bowen*, 752 F.3d 827, 836-37 (9th Cir. 2014) (quotations omitted). The "exception is concerned not with particular lawsuits, but with classes of cases that, absent an exception, would *always* evade judicial review." *Id.* at 836 (citing abortion, injunction, and election cases). Certain types of controversies are "'inherently limited in duration, because they will only ever present a live action until a particular date, after which the alleged injury will either cease or no longer be redressable." *Id.* (quotation omitted); *see also Hamamoto v. Ige*, 881 F.3d 719, 722 (9th Cir. 2018) (per curiam). The present case does not fit within this mold. If, for example, the City extends the moratorium another year (which is entirely speculative), then a challenge can be brought by a plaintiff with actual standing at that time. Likewise, if Mr. Wysingle's tenant leaves before his lease expires, and Mr. Wysingle signs up for Rentberry, this Court could quickly address the matter via injunction practice.[1] Importantly, the question of mootness arises not because of anything the City did, but rather because of the actions of Mr. Wysingle. Court do not, however, "apply the exception where the party's own action . . . has rendered the action moot." *N.E. v. Seattle Sch. Dist.*, 2017 WL 2119317, at * 6 (W.D. Wash. May 16, 2017) (Robart, J.).

Even if plaintiffs could demonstrate that this case falls within the limited class of cases that are

[1] This lawsuit is a case in point, as plaintiffs filed a motion for injunctive relief, yet, inexplicably chose to strike the motion shortly after Mr. Wysingle's deposition.

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inherently of limited duration, they cannot satisfy the exception's second requirement: "a reasonable expectation that the same complaining party will be subjected to the same action again." *U.S. v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018) (quotation omitted). Aside from baldly stating that "it is easily foreseeable that the moratorium will be extended by another year," plaintiffs provide no concrete evidence to support any such statement. Dkt. # 29 at p. 11. It equally speculative that Mr. Wysingle's tenant will leave before the moratorium expires. For example, it is undisputed that Mr. Wysingle's former tenant rented the home for almost three yearlong terms. *See* Dkt. # 27-8 at pp. 11-16. Thus, if history is any indication, Mr. Wysingle's tenant will be around when the moratorium is set to be lifted several months from now. Consequently, even if this Court concludes Mr. Wysingle had standing at the time he filed his Complaint, Mr. Wysingle's decision to rent his home during the pendency of this case has mooted this action because he no longer has a personal stake in the outcome of this case.

As for Rentberry's standing, it is undisputed that the Ordinance does not restrict Rentberry from doing anything. *See also infra* Part B. In fact, the Ordinance cannot even be enforced against Rentberry, as it only applies to landlords and potential tenants. *See* Dkt. # 28 at ¶ 6 ("SDCI lacks that authority to enforce the Ordinance against Rentberry[.]"). Thus, unlike the property owners in *Epona v. County of Ventura*, this is not a case in which Rentberry would be "subject to sanction" if it failed to comply with the law because the law simply does not apply to it. 876 F.3d 1214, 1220 (9th Cir. 2017).

While Rentberry claims it can assert the "injury" of "countless landlords and tenants" in Seattle, *see* Dkt # 29 at p. 12; there is no evidence to support the notion that Rentberry has any landlord or tenant members in Seattle. All Rentberry's declaration says is that "Seattle is one of the key markets for Rentberry since 42% of residents rent their homes." Dkt. # 22-5 at ¶ 10. Nothing in the declaration

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says how many paid customers Rentberry has in Seattle, nor does Rentberry provide a single name of a member who wants to utilize Rentberry's services in the Seattle market. Indeed, Rentberry cannot even claim its fellow plaintiff in this case, Mr. Wysingle, as one of its members. In a related standing context, an association claiming standing through its members must identify at least one member with an Article III injury and support that identification with affidavits establishing that member's injury. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009); *Legal Aid Soc. of Hawaii v. Legal Servs. Corp.*, 145 F.3d 1017, 1030-31 (9th Cir. 1998). There is no dispute that Rentberry failed to do this and therefore has not discharged its burden to demonstrate that it has standing in this case. *See, e.g.*, *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194-95 (9th Cir. 2013) (dismissing appeal for lack of jurisdiction because associational standing not shown when group failed to "identify any affected members by name" or to "submit[ ] declarations by any of its members attesting to harm they have suffered or will suffer under [the challenged] program."). At base, Rentberry's claim amounts to little more than a generalized grievance that it cannot operate its business in a way that maximizes its economic potential.

B. The Ordinance prohibits nonexpressive conduct, not speech.

Plaintiffs do not dispute that if a law is "readily susceptible to a narrowing construction that would make it constitutional, it will be upheld." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) (quotation omitted). Plaintiffs also do not dispute that an enforcing agency's "reasonable limiting interpretation merits [ ] deference." *Yamada v. Snipes*, 786 F.3d 1182, 1190 n.2 (9th Cir. 2015). Nor do plaintiffs dispute that no one has a First Amendment right to operate their business in a way that maximizes their profits. *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 47-48 (1st Cir. 2005). In all but conceding that the enforcement agency's reading is consistent with the Ordinance's plain terms and history, plaintiffs instead lodge an *ad hominin* attack denigrating the

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City's declarant, referring to Ms. Long, who is a code compliance supervisor, as some "low-level compliance officer who has worked at the City for less than a year[.]" Dkt. # 29 at p. 13. Plaintiffs' dismissive characterization notwithstanding, Ms. Long is speaking for the enforcing agency and her declaration expressly states that the Ordinance only prohibits "the use, by either landlords or potential tenants for the purposes of completing a rental transaction, of online or application-based" bidding technology. Dkt. # 28, ¶ 7. Rather than address this binding interpretation of the Ordinance, plaintiffs take a swipe at Ms. Long.

In attempting to shoehorn this case into accepted First Amendment territory, plaintiffs claim they have "presented uncontroverted evidence that it is impossible to advertise properties on Rentberry without the bidding feature." Dkt. # 29 at p. 14. Remarkably, plaintiffs cite to Rentberry's CEO's declaration to support this statement, which says only that "the bidding feature is an integral component of the site." Dkt. # 22-5, ¶ 5. This ambiguous statement says nothing about whether advertisements can or cannot be placed on Rentberry's website without actual bidding occurring, but that seems highly unlikely unless Rentberry is saying that every landlord who advertises a listing, or every potential tenant who signs up for its services, *must use* the bidding function.[2] Rentberry's declaration says no such thing, and Rentberry did not provide an updated declaration in response to the City's motion. *See generally* Dkt. # 22-5.

In any event, as a legal matter, Rentberry's concerns are irrelevant because the enforcement

[2] The City notes again that when it tried to depose Rentberry's CEO in June, opposing counsel told the City that he had left the United States and would not be returning until October. *See* Dkt. # 27, ¶ 7. To the extent the Court is inclined to accept that "integral" means that Rentberry's entire website will not work unless someone actually uses the rent-bidding function, the City would request a continuance under Fed. R. Civ. P. 56(d) to depose Rentberry's CEO. The City does not believe this will be necessary, however, because it is plaintiffs' burden to demonstrate that the First Amendment applies to the conduct at issue, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984); and, any ambiguity created by Rentberry's CEO is of Rentberry's own making. Put simply, plaintiffs should not be allowed to manufacture a dispute of material fact when they have refused to allow the City to depose one of their declarants.

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agency has stated in unequivocal terms that Rentberry is "free to enable its auctioneering technology on its website when listing rental properties" in Seattle. Dkt. # 28, ¶ 5. Rentberry's stated concerns are hollow rhetoric, designed more to protect its chosen business model than to explain how its technology actually functions. Because the Ordinance does not prohibit or regulate advertising rental properties in Seattle, any First Amendment arguments on that score should be rejected.

Furthermore, the Ordinance does not tell people what they can or cannot say; it only tells them what they can or cannot do. This critical distinction is lost on plaintiffs. If the distinction between speech and nonexpressive conduct is to have meaning, plaintiffs' challenge must fail. While plaintiffs talk generally about the expressive nature of *communicating* prices at an intentionally high level, they fail to explain how the *use* of bidding technology, which is indisputably conduct, is inherently expressive or communicates any sort of message. This failure is fatal to plaintiffs' First Amendment claim.

In running to the safe harbor of generalities, plaintiffs sidestep the threshold question, and in the process ignore controlling authority. The Ninth Circuit has held that the "threshold question is whether conduct with a significant expressive element drew the legal remedy or the ordinance has the inevitable effect of singling out those engaged in expressive activity." *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015) (quotation omitted). This is so because "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct, [and] the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). The Ordinance is directed at economic conduct, not speech.

The Ordinance does not regulate speech but instead, merely regulates how a rental transaction is conducted. More specifically, it targets one specific form of conduct occurring within that

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transaction—using bidding technology to consummate the transaction. Any impact on speech is purely incidental. It is not the alleged speech—talking about prices—that "drew the legal remedy," rather it is a specific form of conduct—the use of bidding technology—that drew the remedy. While plaintiffs complain that the City is cutting off their ability to speak about prices, "[t]he severity of this burden is dubious at best, and is mitigated by the fact that [plaintiffs] remain free" to discuss prices elsewhere and through different mediums. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986). "In any event, this argument proves too much, since every civil or criminal remedy imposes some conceivable burden on First Amendment protected activities." *Id.* at 705-06; *see also Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 62 (2006) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed") (quotation omitted). Because the Ordinance targets nonexpressive conduct, not speech, the City is entitled to judgment as a matter of law.

C. The Ordinance is proper under *Central Hudson*.

In arguing that the Ordinance fails intermediate scrutiny, plaintiffs misrepresent the applicable law and mischaracterize the Ordinance. First, the evidence underpinning the Ordinance easily meets the requisite standard, which is much less exacting than plaintiffs would have this Court believe. Second, the inapplicability of the Ordinance to hypothetical forms of offline rent-bidding does not render the Ordinance underinclusive. Third, even if the City were required to select the least restrictive means available to advance its interests, plaintiffs' suggested alternatives are poor substitutes for the Ordinance.

While the City is not "certain" as to the extent of the harm that online auction technology would inflict on the rental housing market, the First Amendment does not require certainty—or

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even "firm conclusion[s]"—as a prerequisite for regulating commercial speech. Dkt. # 29 at pp. 16-17. The non-binding authorities plaintiffs cite for the notion that the City lacked "sufficient evidence," *id*. at 13, merely require something more than "speculation or conjecture"—a far cry from the degree of certainty plaintiffs demand. *See Sw. Bell Tel. L.P. v. Moline*, 333 F. Supp.2d 1073, 1083 (D. Kan 2004) (order granting preliminary injunction where government had "not cited *any evidence* that its theorized harm [was] real" and the "only evidence in the record refute[d]" government's position as to the need for the challenged regulation) (emphasis added); *see also IMDB.com, Inc. v. Becerra*, 257 F.Supp.3d 1099, 1102 (N.D. Cal. 2017) (order denying discovery motion where government "having failed to present *any colorable argument or evidence* in support of the notion that its speech restriction [was] actually necessary" to achieve the stated goals attempted to use discovery to "go fishing for a justification") (emphasis added). Notably, in suggesting that the City's lack of certainty precludes it from regulating online auction technology, plaintiffs make no attempt to distinguish binding authority permitting a prophylactic approach to regulation under the First Amendment. *See* Dkt. # 29 at pp. 16-18; Dkt. # 26 at pp. 26-27; *Burson v. Freeman*, 504 U.S. 191, 209 (1992); *Minority Tel. Project, Inc. v. FCC*, 736 F.3d 1192, 1207 (9th Cir. 2013) (en banc).

In arguing that the City's evidence falls short of the applicable standard, plaintiffs caricaturize the City's position, describing the Ordinance as "patently speculative in nature." Dkt. # 29 at p. 16. In fact, as detailed in the City's motion, the City had copious evidence that online auction technology would raise rental housing costs—notwithstanding its lack of absolute certainty on the subject and its desire to conduct further research. *See* Dkt. # 26 at p. 26. Indeed, plaintiffs do not dispute that the government may rely on data from other jurisdictions, or even deductions, inferences, or common sense. *See* Dkt. # 26 at pp 25-26. In relying upon data on online auction

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technology from San Jose and San Francisco, studies on similar phenomena in other jurisdictions, and the commonsense notion that regulating new technology is more effective before that technology proliferates, the City did exactly that. Moreover, plaintiffs provide no evidence that online auction technology would *not* impact the rental housing market. *See generally* Dkt. # 29.

Plaintiffs' arguments as to underinclusivity are also unpersuasive. Plaintiffs concede that a regulation is only underinclusive if it fails to regulate activity that "affects its stated interests *in a comparable way*." Dkt. # 29 at p. 18 (quoting *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015)). But plaintiffs' attempts to equate the use of rent bidding platforms with other forms of rent bidding are unavailing. Plaintiffs do not dispute the commonsense proposition that online auction technology allows bidding to occur on a much larger scale than other potential forums for rent bidding. Dkt. # 29 at p. 22; *see* Dkt. # 26 at p. 28. Instead, they merely argue that other forms of rent bidding have existed longer than the use of online auction technology—a distinction that has no bearing on the relative impact of these activities on the rental housing market. *See* Dkt. # 29 at p. 18. If anything, the presence of alternative means of rent-bidding renders the Ordinance *less* constitutionally suspect, in that it leaves open alternative channels for communication. *See Arcara*, 478 U.S. at 705.

Tellingly, plaintiffs make no attempt to distinguish the multitude of commercial speech cases upholding regulations that apply unevenly to different aspects of a problem. *See e.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981) ("It does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising"); Dkt. # 26 at pp. 27-28 (citing additional cases). Instead, they rely on a case involving non-commercial speech, which is subject to a more stringent legal standard. *See* Dkt. # 29 at pp. 18-19 (citing *The Florida Star v.*

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B.J.F., 491 U.S. 524 (1989)); *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562-63 (1980).

Finally, regardless of how one characterizes the ultimate purpose of the Ordinance, the "less restrictive" alternatives that plaintiffs suggest are incomparable, because they have nothing to do with the auction technology the City intends to study and potentially regulate. *See* Dkt. # 29 at pp. 19-20; *see also Metro Lights, LLC v. City of Los Angeles*, 551 F.3d 898, 906 (9th Cir. 2009) (government need not select least restrictive means of advancing a given interest).

For each of these reasons, even if the Ordinance restricted commercial speech, which does not, it survives intermediate scrutiny.

DATED this 18th day of October, 2018

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CERTIFICATE OF SERVICE

I certify that on the 18th day of October, 2018, I caused a true and correct copy of this document to be served on the following via ECF electronic service:

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